United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-2666

To be argued by
VICTOR J. HERWITZ

B P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Respondent,

—v.—

JOHN EGAN,

Defendant-Appellant.

On Appeal From The United States District Court
For the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT JOHN EGAN

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-v-

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BRIEF FOR THE DEFENDANT-APPELLANT JOHN EGAN

Statement of the Issues Presented

The following issues are presented on this appeal:

1. Did the defendant's acquittal after trial in the Eastern District of this Circuit on an indictment which charged, among other things, that on a certain date, within said Eastern District, the defendant and other New York City police officers unlawfully took money from certain named individuals without due process of law in violation of their constitutional rights (18 U.S.C. Sections 242 and 2), estop the government from proving in subsequent prosecutions in the Southern District of this Circuit

for income tax evasion (26 U.S.C. Section 7201) and filing a false income tax return (26 U.S.C. Section 7206 (1), that on the same date specified in the prior indictment, the defendant, within the Eastern District of New York, did, together with the same police officers referred to in the prior indictment, unlawfully take the same money from the same individuals as alleged in the prior indictment upon which, as already stated, the defendant previously had been acquitted?

2. Was proof of defendant's acquittal in the Eastern District indictment referred to above admissible in evidence at the defendant's subsequent trials in the Southern District on the charges referred to above?

Statement of the Case

The Judgment Appealed From

The defendant appeals from a judgment entered in the Southern District of New York on December 2, 1974 (per Metzner, D. J.) convicting the defendant after jury trials before District Judges Metzner and Bryan of income tax evasion (26 U.S.C. Section 7201) and making a false income tax return (26 U.S.C. Section 7206 (1)) and sentencing him on the former count to a term of imprisonment for two and a half years with a minimum period of eight months

before becoming eligible for probation, and sentencing him on the latter count to a term of imprisonment for one year to run concurrently with the sentence on the former count.

The Indictment 74 Cr. 454

The defendant was convicted of counts four and five of a six count indictment filed against him in the Southern District of New York on April 25, 1974. Count four accused him in substance of an attempt to evade and defeat payment of his income tax for the year 1970 in that in the joint return he had filed with his wife for that year he stated that their taxable income was $15,269.97 and the amount of the tax due was $3,053.90 whereas, as he knew, their taxable income for that year was approximately $80,529.97 and the tax due thereon was approximately $22,323.94 in violation of 26 U.S.C. 7201.*

Count five accused the defendant of making a false and perjurious income tax return for the year 1970 in stating that the gross income of himself and his wife for that year was $15,269.97 whereas, as he knew, it was approximately $80,529.97, in violation of 26 U.S.C. Section 7206 (1).**

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*Tried before Judge Metzner.
**Tried before Judge Bryan.

It was the Government's contention in support of the tax evasion count that, in the year 1970, while the defendant was a New York City police lieutenant in command of the Special Investigation Unit (SIU), whose mission it was to investigate major narcotics violators, the defendant and other members of that unit "stole money from the very people they were supposed to apprehend and let those people go free" (3)*; that it was the proceeds from those thefts, amounting to approximately $55,000.00, which the defendant failed to report on his income tax return or pay taxes on (3-11). In his opening to the jury on the trial of this count before Judge Metzner, the Assistant United States Attorney said this (6):

> "On May 11, 1970, there was an arrest made at the Kennedy Airport and at the Holiday Inn, and money was taken from the narcotics dealers who were arrested, and you will hear evidence that John Egan shared in the money that was taken, and, specifically, he received $15,000.00 in cash."

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*Numbers in parenthesis, except where otherwise indicated, refer to page numbers in the stenographic transcript of the trial before Judge Metzner on the tax evasion count.

The Government made the further claim with respect to the false tax return count that, in addition to the income obtained by illict means as set forth above, the defendant also had interest income on bank deposits amounting to $1300 (B 1613-1614)*.

The Factual Basis For The Claimed Estoppel

The defendant claimed on the trials before both Judges Bryan and Metzner that the Government was estopped from proving that the defendant had obtained any of the proceeds of the money allegedly taken from the persons arrested on May 11, 1970 at Kennedy Airport (788-790; 798-801; B1073; B1291-1292). He based his claim on his acquittal on Count Two of indictment 74 CR.312 filed in the Eastern District of New York on April 19, 1974 which alleged as follows:

> On or about the 11th day of May 1970, within the Eastern District of New York, JOHN EGAN and PETER DALY, the defendants, and Joseph Novoa, Charles Worster, Gabriel Stefania and Carl Aguiluz, named herein as co-conspirators but not as defendants, wilfully, knowingly and unlawfully did take, extract and appropriate to themselves approximately $230,000 from Luis Torres, Wladimir Bandera, Lilliana Torres, Jorge

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*Numbers in parentheses preceded by the letter "B" refer to page numbers in the stenographic transcript of the trial before Judge Bryan on the false income tax return count.

> Martinez Diaz, Guillermo Saavedra, John Doe, also known as "Lito" and John Doe, also known as "El Tio", thereby depriving the aforesaid individuals of a right secured and protected by the Fifth and Fourteenth Amendments to the Constitution of the United States, namely, the right not to be deprived of property without due process of law. (Title 18, United States Code, §242 and §2)

Despite defendant's acquittal of the above quoted charge (which occurred on May 17, 1974 after a trial before District Judge Weinstein and a jury), the Government was not estopped from offering proof that on May 11, 1970, at Kennedy Airport Detective Peter Daly had arrested "three Latin Americans" (including Luis Torres)* and confiscated $210,000 in cash which they had in their possession (35;377-378); that Daly was joined at the airport by Sergeant Gabriel Stefania who was apprised of the seizure of the money (378); that Daly and Stefania took the prisoners and their money to the Holiday Inn on 57th Street in Manhattan where they met and conversed with Detective Carl Aguiluz, Joseph Novoa and the defendant Egan (377-378); that Daly told Aguiluz that of the $210,000 seized from the prisoners he had brought back from the airport $56,000 and left the remainder with a trusted friend at Kennedy (462); that Daly gave Agui-

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*See Count One paragraph 10 of the indictment 74 CR. 348.

luz the satchel with the $56,000 in cash in it (379); and that then Aguiluz and Egan went to a room in the Holiday Inn previously engaged by the latter (379).

The Government was then permitted to prove that Aguiluz, in the room at the Holiday Inn, took the $56,000 out of the satchel, added $20,000 in cash which he and Novoa had seized from confederates of Torres who they were holding at the Holiday Inn, and divided it up allocating a share for himself, Egan, Daly, Novoa, Stefania and Patrolman Charles Worster (379-381); that Egan's share was $15,000 (380). It was this $15,000 which the Government claimed in the instant preceding was part of the undeclared income of Egan for the year 1970.

In further support of the above claim the Government was permitted to show that the defendant made the following cash deposits in various bank accounts of his: May 27, 1970, $5700; May 29, 1970, $5500; June 15, 1970, $300; July 10, 1970, $750 (381).

It will certainly be conceded by the Government on this appeal that the evidence referred to above (except for the June 15 and July 10 bank deposits) was the same evidence which was relied upon by the Government in the Eastern District prosecution under Count Two in indictment 74 CR 312 which, as already stated,

resulted in defendant's acquittal.

When defendant's claim of collateral estoppel was rejected by both Judges Bryan and Metzner, the defendant sought permission to introduce into evidence the judgment of acquittal in the Eastern District prosecution; that offer was also rejected by the trial Judges (788-790;967;B1073;B1291-1292).

Among the grounds urged by the defendant for the dismissal of the income tax counts and for setting aside the judgment of conviction with respect thereto was defendant's claim that he had been denied a fair trial in accordance with due process of law. He based that claim on the inclusion in those charges, as one of the items of alleged income, the proceeds from the so-called Airport case upon which he had already been tried and acquitted in the Eastern District (798-801).

It was the Government's position, which was apparently accepted by the trial Judges, that, since Judge Weinstein in the Eastern District trial had charged the jury that in order to find the defendant guilty "that some part of the events constituting the crime charged in the indictment took place in the Eastern District of New York " (Weinstein, J. charge p 724 et seq), collateral estoppel could not be invoked.

THE ARGUMENT

THE DEFENDANT'S ACQUITTAL IN THE EASTERN DISTRICT ON AN INDICTMENT WHICH CHARGED THAT ON A CERTAIN DATE WITHIN THAT DISTRICT THE DEFENDANT AND OTHER POLICE OFFICERS TOOK MONEY FROM CERTAIN NAMED INDIVIDUALS IN VIOLATION OF THEIR CONSTITUTIONAL RIGHTS ESTOPPED THE GOVERNMENT FROM PROVING IN SUBSEQUENT PROSECUTIONS IN THE SOUTHERN DISTRICT FOR INCOME TAX VIOLATIONS THAT ON THE SAME DATE SPECIFIED IN THE EASTERN DISTRICT INDICTMENT THE DEFENDANT WITHIN THAT DISTRICT TOGETHER WITH THE SAME POLICE OFFICERS REFERRED TO IN THAT INDICTMENT HAD UNLAWFULLY TAKEN THE SAME MONEY FROM THE SAME INDIVIDUALS AS ALLEGED IN THE PRIOR INDICTMENT; PROOF OF THE PRIOR ACQUITTAL IN THE EASTERN DISTRICT WAS ADMISSIBLE IN EVIDENCE IN THE SUBSEQUENT SOUTHERN DISTRICT PROSECUTIONS; THE TRIAL JUDGES' REJECTION OF THESE CLAIMS ASSERTED BY THE DEFENDANT WAS REVERSIBLE ERROR BECAUSE IT WAS CONSTITUTIONALLY IMPERMISSIBLE UNDER COLLATERAL ESTOPPAL PRINCIPLES.

(1)

The Principles Of Law Relative To "Collateral Estoppel"

"Collateral estoppel", it has been said, "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future litigation." Ashe v. Swenson, 397 U.S. 436, 443. It has been an established rule of federal criminal law at least since the Supreme Court's decision in U.S. v. Oppenheimer, 242 U.S. 85. It is an integral part of the double jeopardy guarantee of the Fifth Amendment (Ashe v. Swenson, supra; Harris v. Washington, 404 U.S. 55, 56). In the Ashe case, Justice Stewart, writing for the majority, said this at 443-4 as to the manner in which the principle should be applied:

The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."[8] The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." Sealfon v. United States, 332 U.S. 575, 579, 92 L Ed 180, 184, 68 S Ct 237. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.[9]

8. Mayers & Yarborough, Bis Vexari: New Trials and Successive Prosecutions, 74 Harv L Rev 1, 38-39. See Yawn v. United States, 244 F2d 235; United Stacks v. De Angelo, 138 F2d 466.

9." If a later court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest, the possible multiplicity of prosecutions is staggering. . . . In fact, such a restrictive definition of 'determined' amounts simply to a rejection of collateral estoppel, since it is impossible to imagine a statutory offense in which the government has to prove only one element or issue to sustain a conviction." Mayers & Yarborough, supra, at 38. See generally Lugar, Criminal Law, Double Jeopardy and Res Judicata, 39 Iowa L Rev 317. See also Comment, Twice in Jeopardy, 75 Yale LJ 262; Hunvald, Criminal Law in Missouri, 25 Mo L Rev 369, 369-375; Comment, Double Jeopardy and Collateral Estoppel in Crimes Arising From the

Same Transaction, 24 Mo L Rev 513; McLaren, The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases, 10 Wash L Rev 198.

(2)

Applicability of "Collateral Estoppel" Principles to The Case At Bar

If, in the case at bar, "the rule of collateral estoppel is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality", and if this Court, "examines the record of [the] prior proceeding [in the Eastern District], taking into account the pleadings, evidence, charge and other relevant matter," it is respectfully submitted that it must conclude that no rational jury could have grounded its verdict on issues other than those which the defendant sought to foreclose in the case at bar.

The Government must certainly concede that in both the prior Eastern District prosecution and in the instant proceedings it sought to prove the following identical facts:

(a) That on May 11, 1970 Det. Daly had arrested Luis Torres and two companions at Kennedy Airport and taken from them a large amount of money, approximately $210,000;

(b) That Det. Daly and Sgt. Stefania, had returned to the Holiday Inn in Manhattan with their prisoners and with part of the money;

(c) That at the Holiday Inn Daly, after talking with Dets. Aguiluz and Novoa and with the defendant, had given Aquiluz $56,000 of the money he had taken from Torres and his companions at Kennedy Airport;

(d) That Aguiluz, after adding the $20,000 which he had seized in Manhattan from Torres' accomplices, divided the total by allocating shares for himself, the defendant Sgt. Stefania, and Dets. Novoa, Daly and Ptl. Worster; that defendant's share was $15,000.

In the Eastern District trial, as the Government will concede it was undisputed that Det. Daly and Sgt. Stefania took Torres and his two companions from the airport to Manhattan where they were booked at a police precinct; it was also undisputed that, if any money had been taken from Torres or his companions it had been taken from them at Kennedy Airport. The only real issues in the case were (a) whether any money had been taken from Torres or his companions at any time or place; and, (b) whether, if it had been, any part of it was given to the defendant Egan.

In light of the foregoing, the not guilty verdict on the Eastern District indictment can be explained rationally on only one of two bases (a) that no money was taken from Torres et al; or (b) if it was, that Egan got no part of it. In either event

the Eastern District acquittal determined that the defendant received no part of the $210,000 allegedly seized from Torres et al. Therefore, under well-settled principles of collateral estoppel, the Government in the case at bar should have been estopped from so proving. Thus, the failure of the trial courts to so restrict the proof was error. Furthermore, since there is no way of knowing whether the jury's verdict was based on this very improperly admitted proof, it can not be shown by the Government that the error was harmless. And, since, the error was one of constitutional proportion, it cannot be held to be harmless unless the court is "able to declare a belief that it was harmless beyond a reasonable doubt." (Chapman v. California, 386 U.S. 18 at 25).

(3)

The Proof of Defendant's Acquittal Was Admissible In Evidence

If, for reasons stated above, the acquittal of defendant in the prior proceeding in the Eastern District determined that the defendant received no part of the money seized from Torres and his companions at Kennedy Airport, then, obviously, proof of that judgment was competent, relevant and material and should have been admitted into evidence (see U.S. v. Johnson, 165 F2d 42, 49 3rd Cir.). The trial court's rejection of this evidence was highly prejudicial because such evidence

would also have reflected upon the credibility of Aquiluz and Stefania, without whose testimony all but one item of alleged income to the defendant could not have been proved.

(4)

Multiple Prosecution Of The Airport Case Was Unfair

Even if a hypertechnical application of the principles of collateral estoppel would require the rejection of defendant's arguments stated above that should not be the end of the matter. This Court, in the exercise of its supervisory power over the administration of criminal justice in this Circuit certainly cannot approve what was done here.

On April 19, 1974 the defendant was indicted in the Eastern District on two counts, one for conspiracy to violate 18 U.S.C. Section 242 (taking property without due process of law) and a substantive violation of that section. This indictment was based upon the same facts and evidence as referred to above relative to the seizure of money from Torres et al at Kennedy Airport and from his confederates at the Holiday Inn (74 Cr. 312).

On April 27, 1974, the defendant was indicted in the Southern District on six counts and as to two of them (four and five) involving the income tax violations upon which he

was ultimately convicted, one of the principal items of income was the money allegedly seized at Kennedy Airport (74 Cr. 454).

On May 3, 1976, the defendant was indicted in the Eastern District, charged in one count with a violation of 18 U.S.C. 371 (conspiracy) and this too was based on the facts and evidence in the so-called Airport case.

On May 17, 1976 the defendant was acquitted after trial of the two indictments in the Eastern District and within two weeks he was put to trial in the Southern District on indictment 74 Cr. 454 and required to again "run the gauntlet" and prove his innocence in the Airport case.

If the foregoing doesn't amount to "harassment" the double jeopardy provision of the fifth amendment is calculated to avoid, it is difficult to imagine what is required to demonstrate such harassment. Certainly, the spirit of that important constitutional provision has been assaulted here by the Government's actions and it should not be allowed to go uncensured nor should the defendant be left without remedy.

CONCLUSION

FOR THE REASONS STATED ABOVE THE JUDGMENT OF CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

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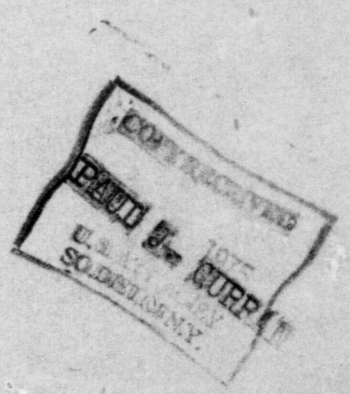
PAUL
CURRIER